SUPREME COURT, U. S.
FILED
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E. ROBERT SEAVER, CLERK

In The Supreme Court of The United States

October Term, 1971

No. 71-803

ROBERT ALOYSIOUS MASON,

Petitioner,

v.

THE PEOPLE OF THE
STATE OF CALIFORNIA,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

EDWIN L. MILLER, JR.
District Attorney
County of San Diego
State of California

By: DANIEL W. FOX
Deputy District Attorney
County of San Diego

Attorneys for Respondent

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OPINIONS BELOW

The opinion of the Supreme Court of the State of California (App. A of Petition) is reported at 5 Cal. 3d 759, 488 P.2d 630, 97 Cal. Rptr. 302 (1971). The opinion of the California Court of Appeal (App. B of Petition) is reported at 92 Cal. Rptr. 628 (Cal. Ct. App. 1971).

JURISDICTION

The Court does not have jurisdiction pursuant to 28 United States Code section 1257 because there has not been a final judgment rendered by the highest court in California in which a decision could be had.

QUESTION PRESENTED

When a valid condition of probation, previously accepted by probationer, directs him to submit to search and seizure, does the probationer have the right to violate his probation by refusing submission to a search or, instead, may the condition, consonant with the Fourth Amendment, be implemented by requiring the probationer's compliance with this term of his probation.

STATEMENT OF THE CASE

The facts leading to institution of the present criminal proceedings against petitioner are fairly and accurately stated by the majority opinion of the California Supreme Court in this case:

> In January 1970 burglars broke into the Alvarado Medical Center in San Diego and stole money, stamps, retail sales items, a radio, 4,000 hypodermic needles and over 30,000 pills and capsules, mostly barbiturates and amphetamines. At the time of the burglary, a hospital employee observed suspicious activity by two men in the parking lot; a second employee noted

the license number of their car, and reported it to the police. The officers traced the car to defendant, living at 2124 Reed Street in San Diego, and discovered that defendant had registered as a narcotics offender and was on probation for possessing marijuana in 1969. The officers noted that one of the conditions of defendant's probation required him to "submit his person, place of residence, vehicle, to search and seizure at any time of the day or night, with or without a search warrant, whenever requested to do so by the Probation Officer or any law enforcement officer."

The officers went to defendant's residence and saw his car parked in front. One of the officers knocked on the door of the house, loudly identified himself and announced that he wanted to search the apartment. Defendant opened the door and an officer informed him that he had reason to believe defendant had participated in a burglary and was subject to search and seizure by court order as a condition of his probation. According to the officer, defendant replied that he was subject to such a condition. Thereupon, without giving defendant the opportunity to refuse or grant permission for a search, the officers entered the house, searched and found in the kitchen a radio which resembled the one stolen from the Medical Center. They arrested defendant, took him away, and subsequently searched defendant's car and house, uncovering further items of contraband. (App. A of Petition 2.)

Two days after this search was conducted, petitioner was charged with several crimes. The crimes were burglary with an acetylene torch (Cal. Pen. Code § 461), receiving stolen property (Cal. Pen. Code § 496.1), possession of restricted dangerous drugs (Cal. Health & Safety Code § 11910), and possession of restricted dangerous drugs for sale (Cal. Health & Safety Code § 11911). Several days after this, on February 2, 1970, a fifth charge was added--that of possession of marijuana (Cal. Health & Safety Code § 11530).

Petitioner was bound over to stand trial in the Superior Court of San Diego County. However, a pretrial motion to suppress evidence, made by petitioner pursuant to California Penal Code section 1538.5, was granted and, upon the People's representation they had no further evidence to present, the case against petitioner was dismissed (CT 13). 1/

The People appealed to the California Court of Appeal, Fourth Appellate District (CT 9). By a 2-1 decision, this court affirmed, on January 28, 1971, the Superior Court's order of dismissal (App. B of Petition 6).

A petition for hearing by the California Supreme Court was granted on March 26, 1971. On September

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1/ In this brief, the following abbreviations will be used to designate the various transcripts comprising the record on petition for writ of certiorari. "CT" designates the clerk's transcript; "Sentencing," the reporter's transcript of petitioner Mason's sentencing on September 3, 1969.

22, 1971, the California Supreme Court vacated the order of dismissal and the cause was remanded to the Superior Court of San Diego County for further proceedings (App. A of Petition 9).

Thereafter, petitioner Mason pled guilty to burglary in the first degree (Cal. Pen. Code §§ 459-60), stipulated to be a lesser included offense of burglary with an acetylene torch, and to possession of restricted dangerous drugs (Cal. Health & Safety Code § 11910). The remaining charges were dismissed on motion of the People (Respondent's App. A). On February 7, 1972, petitioner was sentenced to state prison. The court ordered the burglary and drug convictions to run concurrently with each other and with other prison sentences previously imposed (Respondent's App. B).

ARGUMENT

I

THE PETITION FOR CERTIORARI IS PREMATURE BECAUSE THERE IS NO FINAL JUDGMENT OF THE CALIFORNIA APPELLATE COURTS

Before the Court grants a writ of certiorari, there must be a final judgment "rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257. Since the California Supreme Court rendered its decision on September 22, 1971, petitioner has pled guilty to two criminal charges in this cause and has been sentenced to state prison. Clearly, under California law, petitioner has the right to appeal his convictions and raise anew the legality of the search

conducted in January 1970 of 2124 Reed Street, San Diego. [2]

Respondent concedes there is almost no chance petitioner will be successful in a second appeal to the California appellate courts. In several recent decisions, California courts have held that where appellate review is sought of an order finding a search and seizure legal or illegal, a determination of the question by the appellate court on its merits is thereafter binding at all future stages. Nerell v. Superior Court, 20 Cal. App. 3d 593, 597; 97 Cal. Rptr. 702, 704 (1971); see People v. Werber, 19 Cal. App. 3d 598, 602, 97 Cal. Rptr. 150, 152-53 (1971); People v. Vega, 12 Cal. App. 3d 970, 972, 91 Cal. Rptr. 167, 168 (1970). Nonetheless, futile as an appeal from petitioner's convictions may be, it seems a requirement of the Court's jurisdiction. As the Court said in Parker v. Illinois, 333 U.S. 571, 576 (1948), a somewhat analogous case:

> We find it no more unreasonable for Illinois to require a second appeal than for this Court to do so, as it does when it refuses to review the judgment of a lower state court absent a second appeal to the highest court of the State.

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[2] Section 1538.5(m) of the California Penal Code Code provides:

> A defendant may seek further review of the validity of a search and seizure on appeal from a conviction in a criminal case notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty.

though that be a mere formality because governed by the law of the case established in an earlier appeal.

Upon his January 1972 convictions, until petitioner has sought review of the legality of the January 1970 search in the California Court of Appeal and California Supreme Court, there is no final state judgment and, accordingly, no jurisdiction. Great W. Tel. Co. v. Burnham, 162 U.S. 339 (1896); cf. Wilson v. Schnettler, 365 U.S. 381, 385 (1961).

II

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW

In January 1970 police officers searched petitioner's residence. They based their search on a term of probation to which petitioner was then subject. It was that petitioner was to "submit . . . to search and seizure . . . whenever requested to do so by the Probation Officer or any law enforcement officer." Petitioner argues this search was illegal. The basis of his argument, however, is unclear. Possibly petitioner is arguing that constitutionally a probationer never can be compelled to submit to search and seizure, no matter how explicit the probation order or how manifest the probationer's assent to such an order. Or perhaps petitioner is saying that while a probationer can waive his Fourth Amendment rights, "courts indulge every reasonable presumption against waiver," and since petitioner's September 1969 probation order is ambiguous, the doubt should be resolved in petitioner's favor. The Court should find, petitioner argues, he had the

right, by the terms of his probation order, to violate it by refusing to submit to search and seizure.

If the latter is petitioner's argument, clearly this case presents no important question of Federal law. What, in effect, petitioner asks this Court to do is grant certiorari so that it may interpret the language of a solitary probation order imposed in San Diego County in 1969.

Not only would this fail to be a special and important reason for granting the writ, Sup. Ct. R. 19, but upon review of the probation order, it would be manifest that petitioner's waiver of the Fourth Amendment met the rigorous test for waiver of any constitutional right set forth in Johnson v. Zerbst, 304 U.S. 458, 464 (1938). At his sentencing, petitioner was represented by able counsel. The terms of probation, as proposed by the sentencing court, were read by the court to petitioner and his counsel. The court then inquired of petitioner whether he understood what had just been said; petitioner replied that he did (Sentencing 3-4). Boykin v. Alabama, 395 U.S. 238 (1969), seems analogous to the question at hand; the analogy supports respondent's argument that petitioner intelligently waived his rights.

III

THERE IS NO CONFLICT OF DECISION

Assuming, however, petitioner's contention is that the state cannot constitutionally compel a probationer to submit to search and seizure, despite the probationer's previous agreement to do so, the petition for writ of

certiorari still should not be granted. Over 25 years ago, in a decision still viable today, the Court held that one can waive his Fourth Amendment rights in advance of any search that otherwise would be illegal. The California Supreme Court's holding to the same effect in the instant case is, thus, completely in harmony with applicable decisions of this Court.

In Zap v. United States, 328 U.S. 624 (1946), judgment vacated on other grounds, 330 U.S. 800 (1947), petitioner entered into contracts with the Navy Department. His contract provided that his records were to be open at all times to the Government and its representatives. Acting pursuant to this provision of the contract, FBI agents inspected petitioner's books. They discovered various documents that tended to prove petitioner had overcharged the Government for work he had done on the contract. Petitioner was convicted of presenting false claims against the United States after this evidence was presented in court.

This Court affirmed. It said:

> [T]he law of searches and seizures as revealed in the decisions of this Court is the product of the interplay of the Fourth and Fifth Amendments. But those rights may be waived. And when petitioner, in order to obtain the Government's business, agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts. (328 U.S. at 628.)

In all important respects, the instant case is the same as Zap. Petitioner could have been sentenced to

prison upon his conviction for possession of marijuana. He avoided this through receiving probation. He did not have to accept probation any more than Zap had to do business with the Government. He did, however, accept probation with one of the conditions being that, during his probationary period, he submit to search and seizure by a police or probation officer. Several months after petitioner's sentencing, this term of probation was the basis of a search of petitioner's residence. Petitioner had no more right to refuse to submit to search and seizure than petitioner Zap had the right to refuse inspection of his books by the Government's agents. Zap v. United States, 328 U.S. 624 (1946); cf. Katz v. United States, 389 U.S. 347, 358 n. 22 (1967).

IV

THE DECISION BELOW IS CLEARLY CORRECT.

Apart from the Zap decision, policy reasons support the decision of the California Supreme Court.

When petitioner appeared for his sentencing in 1969, he stood before the court a felon convicted of a narcotics offense. The judge would have been justified in sending petitioner to prison. Instead he gave him an opportunity to prove himself. 2/ In so doing, however, the judge was taking a risk. As the court below notes,

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2/ "The word 'probation' derives from the Latin, its root meaning being 'a period of proving or trial.'" D. Dressler, Practice and Theory of Probation and Parole 6 (1959).

recidivism is particularly high for narcotics offenders (App. A of Petition 6 n. 2). Thus, one of the conditions upon which probation was granted was that petitioner consent to search and seizure.

The effect this condition is intended to have is rather obvious. "With knowledge he may be subject to a search by law enforcement officers at any time, [a probationer] will be less inclined to have narcotics or dangerous drugs in his possession." People v. Kern, 264 Cal. App. 2d 962, 965, 71 Cal. Rptr. 105, 107 (1968). If the condition has its intended effect, society is protected from further depredations by the narcotics offender. By offering this protection, the sentencing judge is thus warranted in granting probation.

A second desirable effect of the condition is that by refraining from possessing drugs or narcotics, because of the threat of search, rehabilitation of the narcotics or drug offender is facilitated. Neither of these desirable effects can be realized, though, if probationers, such as was petitioner, are free to refuse to submit to search and seizure. Compulsion, and only compulsion, is the force through which a probationer is made less inclined to possess dangerous drugs or narcotics.

Petitioner maintains that if the decision of the California Supreme Court stands, police will be given power to, in mass, conduct general, arbitrary searches. (The same argument could have been made by Zap.) That argument is best answered by the California court itself:

> We do not intend to suggest that one who has accepted such a condition to the grant

of probation is thereafter barred from objecting to the unreasonable manner in which that condition is carried out by police officers. For example, a probationer who claims unlawful harrassment by officers in executing a search may seek appropriate relief from the trial court, including an amendment of the order of probation. (App. A of Petition 7 n.3.)

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

EDWIN L. MILLER, JR.
District Attorney
County of San Diego
State of California

By: DANIEL W. FOX
Deputy District Attorney
County of San Diego

Attorneys for Respondent

APPENDICES

APPENDIX A

CR 20491

DA 6 2048

COURT CONVENES AT 9:45 A.M. / ~~P.M.~~
(time)

MONDAY, JANUARY 17, 1972
(date)

PRESENT:

HONORABLE FRANKLIN B. ORFIELD JUDGE
PRESIDING 7
(dept.)

CLERK MERRITT W. SMITH REPORTER Eve Reed, Reporter

THE PEOPLE OF THE STATE OF CALIFORNIA Frank Sexton
(Deputy District Attorney)

vs.

ROBERT ALOYSIOUS MASON (Defendant) NEAL PEREIRA (Attorney for Defendant)

CRIME OF PC 464; 496.1; H&S 11910; 11911; 11530; pr

☐ ARRAIGNMENT
☐ ARRAIGNMENT FOR JUDGMENT
☐ MOTION
☐ PROBATION
☐
☒ Readiness Conference

Comes now the District Attorney, and comes the defendant in person and by counsel. Upon leave of court the defendant withdraws his plea of, "Not Guilty," as heretofore entered and now pleads that he is guilty of the offense, PC 459 - 1st Degree Stip-LIO PC 464, Ct. 1 and H&S 11910, Ct. 3 as charged. Defendant makes application for probation.

and hearing thereon and pronouncement of judgment are set for Feb. 7, 1972 in Dept. Seven at 9:00 A.M.

On motion of People, Cts 2-4-5 are dismissed, and prior stricken in the furtherance of justice.

Defendant in custody. Bail as previously fixed is continued.

Cal. No. _____

CRIMINAL MINUTES CR-02 Co. Clk. (7-71)

The foregoing instrument is a full, true and correct copy of the original on file in this office.

Attest FEB 29 1972 19____

JESSE OSUNA, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of San Diego.

By Marjorie Lindberg Deputy
MARJORIE LINDBERG

APPENDIX B

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

JUDGMENT OF CONVICTION TO STATE PRISON

FILED
FEB 7-1972
JESSE OSUNA, Clerk
By Merritt W. Smith Deputy

No CR 20491

The People of the State of California,
Plaintiff,

vs.

ROBERT ALOYSIOUS MASON
Defendant.

Present:
Hon. FRANKLIN B. ORFIELD
Judge of the Superior Court

Edwin L. Miller, Jr.,
District Attorney.

By Steven Davis, Deputy

Neal Pereira
Dounsel for Defendant

Merritt W. Smith
Clerk

Eve Reed
Reporter

The defendant is duly arraigned and sentenced as indicated.

XXXXXXX

Whereas the said defendant having duly plead guilty in this court of the crime of

Burglary (PC 459), First Degree, a stipulated lesser included offense of Burglary with Explosives (PC 464), Count 1; and Possession of Restricted Dangerous Drugs (H&S 11910), Count 3; and allegation of prior felony conviction having been stricken,

and probation having been denied,

It is Therefore Ordered, Adjudged and Decreed that the said defendant be punished by imprisonment in the State Prison of the State of California for the term prescribed by law.

IT IS ORDERED that the sentences shall be served concurrently with respect to one another, and concurrently with respect to any prior incompleted sentence.

IT IS FURTHER ORDERED that credit be allowed for time heretofore served from April 10, 1970.

It is further ordered that the defendant be remanded into the custody of the Sheriff of the County of San Diego, to be by him delivered into the custody of the Director of Corrections at the California Institution for Men at Chino.

XXXXXXXXXXXX.

I hereby certify the foregoing to be a true copy

of the Judgment duly made and entered on the minutes of the Superior Court herein.

DATED: February 7, 1972

JESSE OSUNA,
[redacted], County Clerk

By _____, Deputy Franklin B. Orfield
Judge of the Superior Court
FRANKLIN B. ORFIELD

JUDGMENT OF CONVICTION TO STATE PRISON

The foregoing instrument is a full, true and correct copy of the original on file in this office.

Attest FEB 29 1972 19___
JESSE OSUNA, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of San Diego.

By Marjorie Lindberg, Deputy
MARJORIE LINDBERG